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## Symposium Foreword –The Homosexual and Society: A Historical Perspective

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## Symposium Foreword –The Homosexual and Society: A Historical Perspective

### Cover Page Footnote

The author is grateful to James Keenan, J.D., Wayne State University Law School (1985), for his assistance in the preparation of this paper.

## FOREWORD

### THE HOMOSEXUAL AND SOCIETY: A HISTORICAL PERSPECTIVE

*Ralph Slovenko\**

The history of homosexuality has been one of condemnation punctuated by intervals of celebration. For nearly 2,000 years homosexuality has been viewed as evidence of moral weakness, criminality, or pathology. These have been the perspectives, in turn, of religion, law, and medicine. Until recently, homosexuality was seen not as the mark of a distinctive, oppressed minority group, but rather as an individual and very personal problem. The development of a homosexual "lobby," if you will, had its genesis in 1961 after a riot erupted outside a bar on Christopher Street in New York's Greenwich Village.<sup>1</sup> Homophiles began to mobilize for the first time and soon became a major political and economic force. Taking a cue from the civil rights and feminist movements, the struggle for homosexual rights emerged from obscurity. The term "gay," signifying celebration, became common currency.

The existence of homosexuality, and society's mainly adverse reaction to it, has a history as long as civilization itself. The people of ancient Sodom proudly proclaimed their homosexuality, but were condemned by the prophet Isaiah, who deemed homosexuality as akin to bestiality.<sup>2</sup> Homosexuality seems to have flourished in ancient Greece. Greek homosexual love in the fourth century was both passionate and physical. Plato and his friends were overt homosexuals. As far as Plato was concerned, romantic passion was only possible between men and boys. Plato's love for Dion was a model for many ideas about romantic love until the medieval period. The homosexual relationship was cast in

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1. E. BOGGAN, M. HAFT, C. LISTER, J. RUPP & T. STODDARD, *AN ACLU HANDBOOK: THE RIGHTS OF GAY PEOPLE I* (rev. ed. 1983) [hereinafter cited as *ACLU GUIDE*]. See also P. FISHER, *THE GAY MYSTIQUE* (1972); R. SIMPSON, *FROM THE CLOSET TO THE COURTS* (1976).

2. See *Isaiah* 3:9.

the same mold as the modern day romantic love between men and women.

It would, however, be a mistake to consider homosexual love as the rule in ancient Greece. Although Solon granted homosexuals civil rights, homosexuality was not condoned by the common populace, and its practitioners were mocked in Aristophanes' plays. The usual justification for homosexuality in Greece was that women were not fit companions for Athenian intellectuals. By and large, women were relegated to a life of obscurity and illiteracy, and were considered boring. There were some sophisticated women, however, such as the poet Sappho, who ran a school for women on the island of Lesbos (from which the term "lesbian" was derived). But such women were the exception rather than the rule. Demosthenes voiced the typical attitude: "Courtesans we keep for pleasure, concubines for daily [sexual] attendance on our persons, and wives to bear us legitimate children and to be our housekeepers."<sup>3</sup>

Toward the end of the seventeenth century, religious disapprobation of homosexuality became reinforced by state condemnation, as the sin became a crime. Some penal codes retained the religious abhorrence of homosexuality, describing it as a crime not merely against society, but "against nature."<sup>4</sup> Legal codes in the American colonies set death as the penalty for sodomy, and in several instances courts directed the execution of men found guilty of this act.<sup>5</sup> Although most states abolished the death penalty for sodomy by 1825, all but two (Kansas and Utah) in the mid-twentieth century still classified it as a felony.<sup>6</sup> Only murder, kidnapping, and rape carried heavier sentences. Although few men and almost no women were punished under such laws, the statutes imposed the stigma of criminality.

One of the most famous applications of these statutes was England's conviction of Oscar Wilde in 1895 for his involvement in a homosexual relationship with Lord Alfred Douglas. Wilde, one of England's most celebrated playwrights, spent two years in prison for his

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3. See R. BRAIN, *FRIENDS AND LOVERS* 65-67 (1976).

4. See Slovenko, *A Panoramic View: Sexual Behavior and the Law*, in *SEXUAL BEHAVIOR AND THE LAW* 81 (R. Slovenko ed. 1965). For example, Oklahoma's statute provides: "Every person who is guilty of the detestable and abominable crime against nature, committed with mankind or with a beast, is punishable by imprisonment in the penitentiary not exceeding ten (10) years." OKLA. STAT. ANN. tit. 21, § 886 (West 1983). The United States Supreme Court upheld a similar Florida statute against a constitutional challenge of being void for vagueness, saying, in effect, that the meaning of the term "crime against nature" is commonly known. *Wainwright v. Stone*, 414 U.S. 21 (1973).

5. An English statute of 1533 made "buggery" punishable by death. 25 Hen. 8, ch. 6. The "crime against nature" statutes had their origin in this statute and in early Christian writings.

6. See Slovenko, *supra* note 4, at 81.

crime and died soon thereafter at the age of forty-six, his health ruined by the imprisonment and his career destroyed by the outrage of Victorian society.<sup>7</sup>

By the twentieth century, prosecution for homosexual activity had grown increasingly rare. Generally speaking, prosecutions for sodomy in the twentieth century were limited to those involving either gross indiscretion<sup>8</sup> or forceful action.<sup>9</sup> Prosecuting officials and courts seemed to read "notoriety" or "brutality" into the sodomy statutes as essential elements of the offense. The issue in these cases, then, was not really one of homosexuality versus heterosexuality, but rather of the gross violation of social amenities. Writings on the law of homosexuality, as a rule, omit any reference to notoriety or violence and, as a result, they misrepresent the state of enforcement of the law.<sup>10</sup>

The decline in the criminalization of homosexuality was a reflection of the increasing medicalization of homosexuality. As early as the nineteenth century, homosexuality began to be discussed as an illness or disease. It was argued that homosexuals were not so much sinners or criminals as they were mentally ill. In the 1880's and 1890's, doctors debated whether homosexuality was a vice indulged in by weak-willed, depraved individuals, an acquired form of insanity, or a congenital defect that indicated evolutionary degeneracy. By the early twentieth century many were saying that homosexuality was hereditary in origin. The advent of Freudian theory in the 1920's, however, changed both the medical explanations and societal perceptions of homosexuality. The Freudian legacy was to focus on early childhood and unresolved Oedipal conflicts. The emphasis shifted from a concern with genetics to psychic conflict. Freud's biographical reconstruction of the life of Leonardo da Vinci suggested that the combination of an absent father and a dominant mother was central in the development of male homosexuality. In contrast, Bieber and his colleagues in 1962 published data on approximately 100 homosexual males in psychoanalytically oriented therapy which found an abusive father to be the common denominator.<sup>11</sup>

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7. A. ROWSE, *HOMOSEXUALS IN HISTORY: A STUDY OF AMBIVALENCE IN SOCIETY, LITERATURE AND THE ARTS* 164-69 (1977).

8. See *State v. Mortimer*, 105 Ariz. 472, 467 P.2d 60 (1970).

9. See *State v. Trejo*, 83 N.M. 511, 494 P.2d 173 (Ct. App. 1972).

10. See generally *ACLU GUIDE*, *supra* note 1; W. BARNETT, *SEXUAL FREEDOM AND THE CONSTITUTION* (1973). For example, a discussion of cases involving gay people dancing together in public places may fail to note evidence that the parties were engaged in intimate fondling while on the dance floor, behavior which would have been illegal for heterosexuals as well. For this omission, see *ACLU GUIDE*, *supra* note 1, at 78 (discussing *Becker v. New York State Liquor Auth.*, 21 N.Y.2d 289, 234 N.E.2d 443, 287 N.Y.S.2d 400 (1967)).

11. *SOCIETY OF MEDICAL PSYCHOANALYSTS, HOMOSEXUALITY: A PSYCHOANALYTIC STUDY* Published by eCommons, 1984

Events surrounding World War II abetted the perception of homosexual behavior as illness. The federal government ordered psychiatric screening of inductees during World War II, leading to an increase in visibility and enhanced prestige for psychiatry. Homosexuals were deemed medically unfit for service. Americans, by and large, came to view sexual behavior not as moral or immoral, but as sick or healthy, with homosexuality falling into the sick category.

In 1948, Kinsey and his associates entered the scene. In their much-publicized work, they demonstrated that homosexual and heterosexual responsiveness in human beings is not always found in clearly differentiated patterns. They showed that these levels of responsiveness are spread across a continuum that ranges from exclusive heterosexual reactivity to exclusive homosexual reactivity, with various gradations in between. Kinsey suggested a seven-point scale for this continuum based on both overt experience and inner psychological reactions. His study painted a picture of the sexuality of ordinary Americans that was startling. Nothing had challenged the conventional wisdom about homosexuality as much as his finding that fifty percent of males admitted erotic responses to their own sex.<sup>12</sup> Kinsey's work gave an added push at an important time to the emergence of the modern urban homosexual subculture.

Immediately after the war, however, communism replaced nazism as a threat to the country, or so it was perceived. President Truman established a loyalty program for federal employees. In 1950 the Senate produced a report on the *Employment of Homosexuals and Other Sex Perverts in Government*.<sup>13</sup> Some Congressmen argued that "sex perverts" imperiled national security on the grounds that they were vulnerable to blackmail.<sup>14</sup> Kinsey's research caused such commotion that he was denounced as a communist and his research funds were withdrawn.<sup>15</sup>

During the 1960's, the portrayals of homosexual life multiplied in

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(1962).

12. A. KINSEY, W. POMEROY & C. MARTIN, *SEXUAL BEHAVIOR IN THE HUMAN MALE* (1948).

13. In June, 1950, the Senate bowed to mounting pressure and authorized an investigation into the employment of homosexuals and "other moral perverts" in government. In its December, 1950 report the senators remarked that even one "sex pervert in a government agency tends to have a corrosive influence upon his fellow employees. These perverts will frequently attempt to entice normal individuals to engage in perverted practices . . . . One homosexual can pollute a Government office." S. REP. NO. 241, 81st Cong., 2d Sess. 3-5 (1950).

14. See S. DOC. NO. 64, 85th Cong., 1st Sess. 239 (1957); Department of Defense Directive No. 5220 (1966); Note, *Government-Created Employment Disabilities of the Homosexual*, 82 HARV. L. REV. 1738, 1749 (1969); Note, *Security Clearance for Homosexuals*, 25 STAN. L. REV. 403 (1973).

15. Star-Ledger (Newark, N.J.), Jan. 20, 1985, at 45, col. 1.

literature and in the mass media. With the growing volume of such material came a new way of seeing the homosexual "lifestyle." A significant number of persons began to view homosexuals not as isolated, aberrant individuals, but as members of a group. The militancy of homosexual activists allowed the movement to exploit the sexual permissiveness that characterized American culture in the 1960's. The national debate about sexual matters that was sparked by the Kinsey reports cleared away the residue of proscriptions on sexual discourse that was the legacy of Victorianism. Popular attitudes remained hostile, however, and for the overwhelming majority of homosexual men and women a retreat to a secret life was preferable to the stigma that openness would bring.

Homosexuals found that they still had to deal with the "sickness" label, which has wider application than the criminal label. While relatively few homosexuals have been convicted of any "crime against nature"—the vast majority of homosexuals have as spotless a record as heterosexuals—they all fell under the "mental disorder" label of the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders (DSM)*. The first edition of the manual, published in 1952, classified homosexuality as a sexual deviation.<sup>16</sup> The general category within which the sexual deviations appeared was Sociopathic Personality Disturbance, a designation referring to individuals who are ill primarily in terms of society's reaction to them because they fail to conform to the prevailing cultural milieu.<sup>17</sup> In *DSM-II*, the second edition of the manual published in 1968, homosexuality was also classified as a sexual deviation, but sexual deviations were now categorized under Personality Disorders, a group distinguished by deeply ingrained maladaptive patterns of behavior perceptibly different in quality from psychotic and neurotic symptoms.<sup>18</sup>

The "sickness" label backfired on homosexuals; while decriminalizing, it applied broadly. Government and many private employers justified employment discrimination and other policies by referring to *DSM*. "Homosexuals are sick," they argued, and they were able to point to a respected authority. So, in the early 1970's, homophiles argued that much of the prejudice confronting them was a product of psychiatric stigmatization. As a consequence, various homosexual activist groups, supported by some psychiatrists, urged that homosexuality should not be considered a form of mental illness. They demon-

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16. AMERICAN PSYCHIATRIC ASS'N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM-I)* 38-39 (1952).

17. *Id.* at 38.

18. AMERICAN PSYCHIATRIC ASS'N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM-II)* (1968).

strated at the annual meetings of the American Psychiatric Association (APA), disrupted meetings, and stormed the speaker platforms. In 1973, the APA Board of Trustees voted unanimously (with two abstentions) to eliminate the general category of homosexuality from *DSM* and to replace it with a category called "sexual orientation disturbance." This designation would apply only to "ego-dystonic" homosexuality, that is, homosexuals who are either subjectively distressed by or in conflict with their sexual orientation. In 1974, APA members voted by ballot to ratify the trustees' decision. The vote was 5,854 for the trustees' position, 3,810 against, and 367 abstentions. About half of the membership did not vote.<sup>19</sup>

Under the circumstances, the conclusion is inescapable that the vote was made under compulsion. Dr. R. Bayer summarized the events as follows:

Instead of being engaged in a sober consideration of data, psychiatrists were swept up in a political controversy . . . victim . . . of that tumultuous era, when disruptive conflicts threatened to politicize every aspect of . . . social life. A furious egalitarianism . . . compelled psychiatric experts to negotiate the pathological status of homosexuality with homosexuals themselves.<sup>20</sup>

Dr. Jon K. Meyer commented,

At the moment, homosexuality is perhaps the most difficult subject in psychiatry to address. Few conditions affecting the psyche and behavior have been so intensely scrutinized, debated, and politicized. Conceptualization of homosexuality—as a life-style, a preference, an illness, a socio-political movement, a biological predisposition—is marked by a fundamental lack of consensus.<sup>21</sup>

19. Slovenko, *Homosexuality and the Law: From Condemnation to Celebration*, in *HOMOSEXUAL BEHAVIOR—A MODERN REAPPRAISAL* 196 (1980).

20. See Bayer & Spitzer, *Edited Correspondence on the Status of Homosexuality in DSM-III*, 18 *J. HIST. BEHAV. SCI.* 32 (1982); see also R. BAYER, *HOMOSEXUALITY AND AMERICAN PSYCHIATRY: THE POLITICS OF DIAGNOSIS* (1981).

21. Meyer, *Ego-Dystonic Homosexuality*, in *COMPREHENSIVE TEXTBOOK OF PSYCHIATRY* 1056 (H. Kaplan & B. Sadock 4th ed. 1985). Dr. Harold Voth of the Menninger Foundation wrote not long ago: "It is my firm belief that the APA's position on homosexuality is doing enormous harm to our society. Furthermore, nowhere in *DSM-III* is a condition disqualified as a mental disorder if it is ego-syntonic. This provision makes us look like fools." Voth, *PSYCHIATRIC NEWS*, Mar. 18, 1983, at 2 (letter to editor).

Dr. Stanley Lesse, editor of the *American Journal of Psychotherapy*, wrote in an editorial:

The pronouncement of the Board [of the American Psychiatric Association] was in response to the lobbying techniques of organized homosexual groups. . . .

The APA pronouncement will spew confusion in psychiatry and the allied professions not merely in terms of homosexuality but, as we have implied, in relation to other psychological problems. We predict lobbying by many groups representing a variety of psychiatric ailments, and we very likely can predict additional ambivalent but destructive pronouncements. The APA through its Board of Trustees is also guilty of a broad social disservice.

Homosexuals hailed the change in the APA nomenclature, reflected in *DSM-III*,<sup>22</sup> as an "instant cure."<sup>23</sup> To be sure, there have been favorable results. The federal government in 1975 eliminated the ban on employment of homosexuals.<sup>24</sup> In 1976, Governor Milton Shapp of Pennsylvania publicly declared a "Gay Pride Week."<sup>25</sup> In 1980 and in 1984, the Democratic Party included a gay rights plank in its national platform. It was mindful of the country's homosexual population, conservatively estimated at about 10 million,<sup>26</sup> many of whom are now politically active. Homosexuals are growing as an organized political power, notably in San Francisco, where an estimated forty percent of the single men are homosexual.<sup>27</sup> In nearby West Hollywood, of the five city council members, three are admitted homosexuals, making it the first city in the country to be openly run by homosexuals.<sup>28</sup>

The publicity about homosexuality is now pervasive and well-nigh

One can readily picture many well-meaning pseudo-intellectual parents extending the concept that "Billy's or Mary's homosexual propensities are purely variations of the norm and have legitimacy equal to heterosexual behavior."

We previously expressed the view in [an] editorial that discrimination against homosexuals in business and in government should in most instances be eliminated as speedily as possible just as all legal restrictions on sexual acts between consenting adults should be eliminated. This would correct a grievous sociolegal injustice. However, the recent pronouncement by the APA Board of Trustees is not binding upon serious, thinking psychiatrists, psychotherapists, and social scientists who find its viewpoint an illogical step backwards into clinical confusion and denial.

Lesse, *To Be or Not to Be an Illness: That Is the Question—or—The Status of Homosexuality*, 18 AM. J. PSYCHOTHERAPY 1 (1974).

Just about everyone mocks the APA vote on homosexuality, but the APA sought to appease by coming up with a compromise. It decided not to include homosexuality among the paraphilias, but wanted to legitimize the treatment of homosexuality, so it created a category called "ego-dystonic homosexuality," which covers those homosexuals for whom their sexual orientation is a "persistent concern." AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM-III) 281 (1980). To be consistent, however, none of the paraphilias should be considered a mental disorder when ego-syntonic. According to this logic, there would be no mental disorder in the case of a necrophiliac who is not distressed by it. "Distress" is not a factor in the *DSM's* paraphilias; why is it a factor in homosexuality? The debate continues.

22. AMERICAN PSYCHIATRIC ASS'N, *supra* note 21, at 281.

23. See Restak, *Psychiatry in America*, 7 WILSON Q. 95, 119 (1983).

24. In response to the decision in *Society for Individual Rights, Inc. v. Hampton*, 63 F.R.D. 399 (N.D. Cal. 1973), *aff'd*, 528 F.2d 905 (9th Cir. 1975), the Civil Service Commission issued a bulletin in December, 1973, prohibiting those engaged in suitability evaluations from making a determination of unsuitability based solely on homosexual status or admission of homosexual acts. The Civil Service Regulations were amended in 1975 to reflect the *Hampton* opinion by deleting the word "immoral" from the list of reasons which may disqualify an applicant for a federal government position. See 5 C.F.R. § 731.202; FEDERAL PERSONNEL MANUAL SUPPLEMENT 731-33 app. 2.

25. Slovenko, *supra* note 4, at 194.

26. Dullea, *Homosexual Couples Find a Quiet Pride*, N.Y. Times, Dec. 10, 1984, at C12, col. 2.

27. *Id.*, Nov. 23, 1984, at B16, col. 4.

28. *Detfoit Free Press*, Dec. 11, 1984, at 1.

inescapable. Homosexuality is openly displayed and discussed. It is portrayed on stage and screen. Guide books on city life include the homosexual scene.<sup>29</sup> Tens of thousands of homosexual men and women march in annual Christopher Street Liberation Day parades in major cities. The Victorians would be dismayed.

### I. RECOGNITION OF HOMOSEXUAL RIGHTS

Before the 1960's, homosexuals generally feared to speak out about their sexual orientation or to organize groups to secure their legal rights. The few organized groups that did exist used names designed to conceal their homosexual nature so that prospective members would feel less uncomfortable about joining them. Beginning in the 1960's, when the issue came before the courts, it was held rather consistently that advocacy of homosexual rights, even in a state which penalizes private, adult, consensual sodomy, is not advocacy of or incitement to imminent lawless action and is, therefore, protected speech.<sup>30</sup> Thus, government may not prevent homosexuals from speaking or participating in the forum of ideas solely because of the content of their speech absent some compelling state interest.<sup>31</sup>

At a number of universities, homosexual student service organizations have received university recognition and the benefit of school-run facilities enjoyed by other recognized groups. It has been held that a state-run university may not constitutionally reject a student organization whose fundamental purpose is to provide a forum for the discussion of homosexuality. That the presence of such a group may make homosexual behavior more prevalent on campus is not enough, the courts say, to justify a prior restraint on the students' constitutional rights to freedom of association.<sup>32</sup>

A more controversial area concerns the first amendment rights of homosexual teachers in public schools.<sup>33</sup> It is generally recognized that

29. See METRO DETROIT GUIDE 115 (K. Kingsmill & T. Schram ed. 1975).

30. See ACLU GUIDE, *supra* note 1, at 9.

31. See *Pickering v. Board of Educ.*, 391 U.S. 563 (1968).

32. See *Gay Student Servs. v. Texas A & M Univ.*, 737 F.2d 1317 (5th Cir. 1984), *appeal dismissed*, 105 S. Ct. 1860 (1985); *Gay Lib v. University of Mo.*, 558 F.2d 848 (8th Cir. 1977), *cert. denied*, 434 U.S. 1080 (1978); *Gay Alliance of Students v. Matthews*, 544 F.2d 162 (4th Cir. 1976); *Gay Students Org. v. Bonner*, 509 F.2d 652 (1st Cir. 1974).

33. See, e.g., *Acanfora v. Board of Educ.*, 359 F. Supp. 843 (D. Md. 1973), *aff'd on other grounds*, 491 F.2d 498 (4th Cir.), *cert. denied*, 419 U.S. 836 (1974). Acanfora had been transferred from his teaching position to an administrative position when school officials discovered he was a homosexual. The district court had held that Acanfora had been wrongfully transferred, but denied relief because of his subsequent publicizing of the incident in the media. *Id.* at 499. The Fourth Circuit, however, held that Acanfora's speech was protected by the first amendment, but nonetheless affirmed the court's holding because Acanfora had purposefully withheld information concerning his activities in a homosexual organization in his employment application. *Id.* at 504.

an adverse employment action is permissible if the controversial speech either falls outside first amendment protection, or implicates the employee's fitness to perform his or her assigned duties.

In *National Gay Task Force v. Board of Education*,<sup>34</sup> the Tenth Circuit Court of Appeals held unconstitutional an Oklahoma statute which permitted public schools to fire teachers for "advocating, soliciting, imposing, encouraging or promoting public or private homosexual activity in a manner that creates a substantial risk that such conduct will come to the attention of school children or school employees."<sup>35</sup> The United States Supreme Court, in a four-to-four decision with no written opinion, upheld the Tenth Circuit's ruling.<sup>36</sup> That part of the Tenth Circuit's ruling which upheld another part of the Oklahoma statute under which a teacher could be dismissed for public homosexual activity<sup>37</sup> was not appealed and was not before the Supreme Court. The Supreme Court's decision, because it was a tie vote, does not serve as a precedent for other cases but it is final in the six states (Colorado, Kansas, New Mexico, Utah, Wyoming, and Oklahoma) within the Tenth Circuit. There are, however, no similar cases pending as Oklahoma had the only such law in the nation. The chief counsel for the National Gay Task Force commented that despite the absence of a formal opinion, the Supreme Court's ruling was "a benchmark of the progress of the gay rights movement."<sup>38</sup> Be that as it may, given the growing concern over the protection of schoolchildren, the case aroused considerable public controversy and ended in a split vote. Discrimination against homosexual teachers will no doubt continue; surveys of public opinion indicate that the majority of people favor excluding homosexuals from the teaching profession.<sup>39</sup>

The arguments involving homosexual teachers are analogous to the child custody or visitation cases where homosexuality raises a presump-

*See also* Aumiller v. University of Del., 434 F. Supp. 1273 (D. Del. 1977) (holding that when a teacher had made statements on homosexuality in newspaper articles, the teacher's interest in commenting on matters of public concern outweighs the university's interest in promoting the efficiency of its services, which it had claimed were impeded by the teacher's statements).

34. 729 F.2d 1270 (10th Cir. 1984), *aff'd mem. by an equally divided Court*, 105 S. Ct. 1858 (1985).

35. OKLA. STAT. tit. 70, § 6-103-15(A)(2) (1972). The Oklahoma statute was partly inspired by the antihomosexual activist, and former Miss Oklahoma, Anita Bryant. Bryant had spoken before the Oklahoma legislature in 1978, denouncing homosexual teachers and claiming that as role models, homosexual teachers led young people into homosexuality. CBS Evening News, Jan. 14, 1985. *See also* N.Y. Times, Mar. 27, 1985, § 1, at 9, col. 1.

36. *National Gay Task Force*, 105 S. Ct. at 1858.

37. *National Gay Task Force*, 729 F.2d at 1273.

38. N.Y. Times, Mar. 27, 1985, § 1, at 9, col. 1 (quoting Leonard Graff).

39. Dressler, *Gay Teachers: A Disesteemed Minority in an Overly Esteemed Profession*, 9

tion of unfitness or improper influence. Some courts have allowed homosexuals to have custody or visitation only if they limit their behavior in certain ways.<sup>40</sup> Most children of homosexuals are ashamed of their parent's homosexuality, just as they are ashamed of other aberrations. Although some research shows that most children of homosexuals become heterosexual adults, this is not accomplished without a price.<sup>41</sup>

Homosexuals have also battled for acceptance in the media. In general, in the absence of any state action, the choice of material that goes into a newspaper is left solely to the editor's discretion. Many newspapers, therefore, reject advertisements which are deemed offensive or not fit for family consumption. In one case a homosexual students' rights organization sought to require publication of a proposed organizational meeting in the student-run campus newspaper. The court refused to compel publication of the advertisement because no state action was found where the university officials exercised no control over what was published and the editor was elected by the students.<sup>42</sup>

In the broadcasting media, the Federal Communications Commission compels every broadcast licensee to ascertain the "problems, needs and interests" of its community and to design informational programming to meet these needs. Such needs are determined through polling the public and interviewing representative leaders of significant groups within the community.<sup>43</sup> Homosexual rights leaders contend that, given the number of homosexuals in the general population (estimates range from five percent to ten percent of males, and from two percent to five percent of females), they are not properly represented on television. As of now, however, these concerns for a right of access to the media are still in conflict with the discretionary powers of corporate broadcasters.

Homosexual organizations have also had difficulty in attaining the ultimate symbol of acceptance: tax-exempt status. In general, the IRS has denied the applications of homosexual organizations seeking tax-

40. See, e.g., *Nadler v. Superior Court*, 255 Cal. App. 3d 523, 63 Cal. Rptr. 352 (1967) (court ordered that another adult be present during a lesbian mother's visitation). See generally Armanno, *The Lesbian Mother: Her Right to Child Custody*, 4 GOLDEN GATE L. REV. 1 (1973); Harris, *Lesbian Mother Child Custody: Legal and Psychiatric Aspects*, 5 BULL. AM. ACAD. PSYCHIATRY & L. 75 (1977); Riley, *The Avowed Lesbian Mother and Her Right to Child Custody: A Constitutional Challenge That Can No Longer Be Denied*, 12 SAN DIEGO L. REV. 799 (1975).

41. See Pagelow, *Heterosexual and Lesbian Single Mothers*, 5 J. HOMOSEXUALITY 189 (1981). The causative influence of parents may be outweighed by broader exposure to the values that society accords to sex roles. See Gadpaille, *Sexual Identity Problems in Children and Adolescents*, in *SEXUAL PROBLEMS IN MEDICAL PRACTICE* 243 (H. Lief ed. 1981). See generally R. STOLLER, *SEX AND GENDER: ON THE DEVELOPMENT OF MASCULINITY AND FEMININITY* (1968).

42. *Mississippi Gay Alliance v. Goudelock*, 536 F.2d 1073 (5th Cir. 1976), cert. denied, 430 U.S. 982 (1977).

43. See Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. U.L.Q. 1, 10-11.

exempt status. Under the Internal Revenue Code, in order to enjoy tax-exempt and tax-deductible status, an organization must generally be operated for one or more of the following purposes: religious, charitable, scientific, public safety, literary, educational, or for the prevention of cruelty to children or animals.<sup>44</sup> Such organizations are prohibited from carrying on propaganda or attempting to influence legislation. Any such group engaged in "advocacy" of a position must present a "full and fair exposition of the issues" in order to maintain the exemption.<sup>45</sup>

A Revenue Ruling sets out a standard for when a nonprofit homosexual rights organization meets the educational organization standards. A group which is formed to educate the public about homosexuality in order to foster an understanding and tolerance of homosexuals and their problems qualifies for an exemption under section 501(c)(3) of the Internal Revenue Code.<sup>46</sup> This ruling suggests that a somewhat elaborate factual basis must be demonstrated concerning the organization's educational activities before the tax-exempt status will be granted. Moreover, the ruling emphasized that groups which advocate or seek to convince people that they should or should not become homosexuals will not be granted tax-exempt status.<sup>47</sup>

## II. DISCUSSION

The restrictions on teachers, media access, and other publicity about homosexuality are rooted in the idea that homosexuality is contagious, and should be contained. Are such fears warranted? Is homosexuality contagious? In a sense, yes. All people are capable of homosexuality, though not all have the motivation for it. An individual's personality or behavior is formed, or deformed, by surrounding societal norms and pressures. For example, to this day in Eastern Europe, threats persuade youngsters to switch to the right hand for important tasks such as writing. In many societies, left-handers, like homosexuals, have been considered somewhat odd, deceitful, or even evil. As a result, there are few left-handers in such societies. When it is "all right" to be

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44. 26 U.S.C. § 501(c) (1982) (regarding tax-exempt status for the purposes of avoiding federal income tax); *id.* § 170(c) (1982) (regarding tax-exempt status for the purposes of deducting contributions to the organization).

45. See *Big Mama Rag, Inc. v. United States*, 631 F.2d 1030, 1036 (D.C. Cir. 1980) (citing Treasury Regulation 1.501(c) (3)-1(d)(2) (1959)). *Big Mama Rag*, a radical feminist newspaper that the IRS viewed as promoting lesbianism, had been denied tax-exempt status by the IRS on the grounds that it did not qualify as "educational" within the IRS guidelines. The court reversed the IRS's denial of tax-exempt status, holding that the definition of "education" was too vague and gave the IRS too much discretion.

46. Rev. Rul. 78-305, 1978-2 C.B. 172.

47. *Id.* at 173.

left-handed, there are more left-handers. In the same sense, when it is not considered queer to be a "queer," their population increases. When the barriers are down, more people go over to "the other side," as homosexuality is called in some countries. Jean O'Leary, coexecutive director of the National Gay Task Force, concedes that the antihomosexual forces are probably quite right in one respect: "If children understand that one can be a happy and functioning homosexual, perhaps with a beloved teacher as an example, there will be more homosexuals."<sup>48</sup> In a case where homosexuals sought recognition as a student organization on campus, it was argued that formal recognition by the university would tend to "perpetuate" or "expand" homosexual behavior and cause latent homosexuals to become overt homosexuals.<sup>49</sup>

In marked contrast to the United States and other Western countries, there are few overt homosexuals in the Soviet Union. In every society some things are assumed to be good, and other things are assumed to be bad. In this system of images, the homosexual in the Soviet Union is perceived as evil incarnate. That country uniformly enforces the law against homosexuality with a heavy hand (five years in a Gulag prison camp). Actually though, it is the stigma associated with homosexuality, far more than the criminal penalty itself, that deters homosexuality. It is an utter disgrace to be homosexual in the Soviet Union. It is such a dirty word that no one wants even to hear mention of it.<sup>50</sup>

Homosexual activity is sometimes explained as "compulsive activity," that is, acts which are beyond free choice. Others claim that it is the outcome of a deliberate choice motivated by curiosity, opportunity, or caring for another person of the same sex. Some say that physiological factors, such as sex hormone levels, are at the root of homosexuality. Still others claim that homosexuality begins in the home. In any case, the propensity is aided or averted by the social matrix. The more negative the stigma associated with certain behavior, the less likely people are to engage in such behavior.

Though homosexuals are now "celebrating" in the United States, it remains the case that, in the judgment of many, homosexuality is the

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48. N.Y. Post, June 10, 1977, at 29, col. 1.

49. *Gay Lib*, 558 F.2d at 851 n.7.

50. The author makes this observation on the basis of some 15 trips to the Soviet Union during which he has spent approximately three years there. During interviews in the Soviet Union with psychiatrists and others, the point was made that homosexuality is simply not a fact of life in Russia. Books by American journalists and by American students who have lived in the Soviet Union fail to mention homosexuality, as do books on crime in the Soviet Union. Books by Soviet emigrés likewise do not mention homosexuality. See Y. BROKHIN, *HUSTLING ON GORKY STREET: SEX AND CRIME IN RUSSIA TODAY* (1975); I. ZELDES, *THE PROBLEMS OF CRIME IN THE USSR* (1981).

worst fate that could befall a person. In a study of children of the super-rich, Dr. Roy R. Grinker, Jr., found his patients to be bland, bored, and relatively uninvolved; in essence, he found them emotional zombies. Yet one father, whose daughter at the age of thirty had not one single friend or activity, responded to Dr. Grinker's findings, "Thank God, she's not a lesbian."<sup>51</sup> That, apparently for him, would have been the real tragedy.

### III. CONCLUSION

Public policy concerning homosexuals has changed in recent years, to be sure, but the feelings of contempt and hostility continue to run deep and are still reflected in many of the laws and attitudes of contemporary society.<sup>52</sup> Homosexuality arouses anxiety, so much so that the word "gay," once it became associated with homosexuality, has been shunned in common usage.

Should homosexuality be deterred, and if so, by what means? On this score there remains much debate and dissension, which is not likely to soon abate. Among many, a reaction is setting in to the celebration of homosexuality, just as 2,000 years ago when the biblical injunction followed an earlier celebration. The noisy "coming out of the closet," while it may enhance self-esteem, is again provoking a backlash. Truman Capote, who never made any qualms about his homosexuality, suggested a back-to-the-closet movement.<sup>53</sup>

Yet the political, legal, and social gains the homosexual community has made, though inevitably meeting resistance, are unlikely to be reversed. Homosexuality—at one time a sin, a crime, and a sickness—may one day be more tolerated and accepted by the heterosexual majority, though likely never wholeheartedly approved of nor afforded the status of heterosexuality.

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51. Address by Dr. Roy Grinker, 130th annual meeting of the American Psychiatric Association (May 3, 1977).

52. The illustrations of the anxiety provoked by homosexuality are without limit. See, e.g., L. IACocca, AN AUTOBIOGRAPHY 98 (1984). In football, where men dress up as gladiators, touching behinds is permissible, but men embracing or walking hand in hand raises eyebrows. Slade, *Displaying Affection in Public*, N.Y. Times, Dec. 17, 1984, at B14, col. 1. Indeed, calling someone a homosexual may draw gunfire. See *id.*, Dec. 19, 1984, at A17, col. 1.

53. Parker, *Truman, What Have You Been up to Lately?*, NEWSDAY, reprinted in Detroit News, May 4, 1978, at B7, col. 1.  
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